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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 748

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of The Estate of WILLIAM KAPELL, deceased,

Petitioners,

v.

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp., and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION, LTD., a Foreign Corp.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A at the end of this Petition, is reported in 346 F. 2d 532-542. It reversed the judgment for $924,396, returned by a jury empanelled to consider only the amount of the damages from the death of plaintiff's decedent, reversed the District Court's judgment n.o.v. for the plaintiffs, reversed the District Court's alternative order in the exercise of discretion granting the plaintiffs a new trial on all issues, and directed dismissal of the complaint. Judgments have been entered in the district court taxing costs against plaintiffs in the total amount of $7,741.25.

The District Court's very detailed opinion on the judgment n.o.v. and the alternative discretionary order for a new trial appears in the Defendants' Appendix, at 34a-199a and is reported in 219 F. Supp. 289-363 (S. D. N. Y.); its unreported Supplementary Opinion appears in Defendants' Appendix, at 200a-202a. The opinion of the District Court refusing to set aside the verdict of $924,396 is reported in 230 F. Supp. 240 (S. D. N. Y.).

JURISIDICTION

The judgment of the Court of Appeals was dated and entered on June 9, 1965 and its orders denying petition for rehearing were dated and entered on July 20, 1965. Mr. Justice Harlan's order, dated October 11, 1965, extended the time for filing this Petition to November 17th, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether, as a matter of federal law, the carrier is collaterally estopped from relitigating in a U. S. District Court the issue of unlimited liability, arising from wilful misconduct under the Warsaw Convention, where that issue was finally decided against it by jury verdict and judgment of another U. S. District Court on substantially the same evidence as here introduced, in the only prior case involving the same crash, brought by the family of another of the deceased passengers.

The U. S. Court of Appeals' decision below, refusing to hold that Federal law applies and rejecting collateral estoppel, is squarely in conflict with a recent decision rendered by the U. S. Court of Appeals for the Ninth Circuit.

2. Whether the U. S. Court of Appeals exceeded its power in reversing the District Court's order, entered in

the exercise of discretion, adjudging that there be a new trial on the issues of limited and unlimited liability (conditionally, *i.e.* if the Court on appeal should reverse the directed verdict and judgment n.o.v. determining such issues against the defendant carrier as a matter of law), on the grounds that: (a) the jury was likely to have been misled by numerous serious misstatements of defendants' counsel, by erroneously admitted, prejudicial evidence on the critical matter of reliability of the safety equipment, and by a confusing charge on the meaning of wilful misconduct; (b) the verdict was against the weight of the evidence; and (c) such new trial would be required in the interests of justice, in addition, because the carrier, to escape limited liability, was required by Article 20 of the Warsaw Convention to show that it had taken all necessary measures to avoid the crash or that it was impossible to take such measures and the carrier at headquarters had deliberately refused to transmit an instruction of the CAA which, if transmitted to and observed by the pilot, would have prevented the crash.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision, to assure plaintiffs' 7th Amendment right to trial by an unprejudiced jury.

3(a) Where, pursuant to his instrument clearance, having the force of federal law and known to him, the pilot was prohibited from descending, before he had received precise, non-verbal signals which, according to the undisputed evidence, could be received only over a certain location, was the jury entitled to speculate that such signals were received elsewhere or, alternatively, that the pilot did not know that violating his clearance would probably lead

to the crash, the sole basis of either speculation being that it is *prima facie* unlikely that a pilot would risk probable death to all aboard?

(b) Whether the jury could find that deliberate refusal by the carrier to transmit to its pilots a CAA safety regulation establishing minimum en route altitude, having the force of federal law, was merely an honest difference of opinion, and not misconduct?

This is an important question of federal law which has not been, but should be settled by this Court, in the light of the numerous landings of aircraft in bad weather in mountainous terrain, extremely hazardous to thousands of Americans daily unless the safety altitude and safety instrument landing procedures prescribed by the CAA are stringently obeyed by the carriers and their personnel under the treaty sanctions of unlimited or limited civil liability.

4. Whether, by virtue of Article 3(2) of the Warsaw Convention, the carrier lost its treaty defenses of limited or no liability, because it violated the requirement of Article 3(1)(c) that it deliver a passenger ticket to the passenger that sets forth, inter alia, the agreed stopping places.

This important question of Federal law has not been, but should be, settled by this Court.

U. S. TREATY

Pertinent provisions of the Warsaw Convention are contained in Appendix B at the end of this Petition.

STATEMENT

The following facts were either conceded by defendants or established by the undisputed evidence.

A. The Crash

Defendants' plane, having crossed the Pacific and approaching San Francisco International Airport for a scheduled landing, descended into the clouds and crashed into Kings Mountain at 2,000 feet. All aboard were killed: the crew of eight and 11 passengers, including William Kapell, the famous young American pianist. This action is brought in behalf of his widow and orphans.

B. Cause of the Crash

The crash resulted directly from the pilot's failure to comply with the instrument landing approach for which the plane had been cleared by the Control Tower and acceptance of which instruction the pilot had acknowledged to the Control Tower.

It would also have been prevented had the pilot been informed by company headquarters of, and maintained, the 3500 foot altitude set for that area by the Civil Aeronautics Administration.

Defendants conceded that they had not proved that they and their agents had taken all measures necessary to avoid the accident or that it was impossible for them to take such measures.*

C. The Instrument Landing Safety Regulation

The Airport is on San Francisco Bay. Except for the narrow gap at the Golden Gate on the southwest shore, San Francisco Bay is entirely ringed by hills and mountains. The mountains rise in places as high as 2,500 feet. Upon the hills and mountains separating the Bay area

*"We have to prove, by a preponderance of the evidence, that the airline took every measure to avoid the loss, or that it was impossible for them to take such measure. In all fairness, we certainly have not sustained that burden of proof. We haven't brought in any evidence to show." (R. 1821)

from the Pacific, there rests, very commonly, a bank of low-lying clouds, sometimes enveloping the hills and mountains completely and at other times leaving peaks exposed.

Safety regulations, promulgated by the Civil Aeronautics Board and having the force of federal law, have been devised to permit aircraft coming in from the Pacific to cross over the mountains and approach the airport safely under the conditions described above. Under the prescribed procedures, the pilot must stay above the clouds until he establishes his flight position over the ILS Outer Marker, which is past the mountains (App. 94-97a, 104a-105a, 108a-111a; D. App. 83a-84a). *The essence of this instrument approach safety regulation is that the pilot may establish his position over the ILS Outer Marker only by receiving two unique signals on the instruments in the plane actuated by the two transmitters of the ILS Outer Marker* (App. 94a-97a, 104a-105a, 108a-111a). Neither of these signals could have been received in any area reached by the plane; *a fortiori,* both could not. Thus, defendants' experts testified that the first signal, *waver and reversal* of the ADF needles in the plane, could not have occurred except as the plane was passing directly over the ILS Outer Marker, although for the guidance of the pilot to the ILS Outer Marker, the ADF needles begin to point *toward* it 25 miles away (App. 101a, 94a-97a, 104a-105a, 107a-111a; D. App. 49a, 52a). Defendants' experts testified further that the second signal, a blue light accompanied by continuous aural dashes, could not have been received in any area more than two miles from the ILS Outer Marker and defendants conceded that the plane didn't come closer to it than 10½ nautical (12 statute) miles (App. 107a-111a, 94a-97a, 104a-105a, D. App. 42a).

Under the instrument clearance, *the pilot was forbidden to approach by means of visual reference to the ground.*

D. The Pilot's Violation of the Safety Instruction

The pilot did not fly over the ILS Outer Marker (App. 103a-104a, 111a, 101a; D. App. 44a). There was no evidence of any emergency justifying a departure from the prescribed approach procedures.* Intentionally descending into the clouds, the pilot hit Kings Mountain.

E. Violation, at Company Headquarters, of the CAA Instruction

Defendant BCPA's applicable prescribed instrument approach into San Francisco Airport, authorized by the Civil Aeronautics Administration, showed on its face that the minimum altitude beween Half Moon Bay and the ILS Outer Marker was 3500 feet (PX 55, D. App. 323a).

A misunderstanding had arisen, among pilots and operations personnel, as to whether the said 3500 feet minimum applied when Air Traffic Control cleared the flight to maintain "500 feet on top" of the clouds until over the ILS Outer Marker. To eliminate the misunderstanding, the CAA, by letter dated November 1, 1951, informed BCPA that on a clearance of "500 feet on top", BCPA pilots must maintain the minimum en route altitude (3500 feet) and instructed BCPA to disseminate the ruling to its pilots (App. 37a-39a, PX 51). BCPA considered such letter, as appears from notations on the face of it (App. 39a), but decided not to, and did not, transmit the ruling to its pilots (App. 99a-100a, 201a-202a) even though BCPA was required to comply with the rulings of the CAA in conducting its flight operations in the United States (App. 94a-98a). The crash occurred at 2000 feet.

*The Court so charged the jury as a matter of law (D. App. 22a). The defendants took no exception to this part of the charge, and on the appeal did not contend there was any emergency or any evidence of such.

F. The Prior Jury Verdict of Wilful Misconduct, and Judgment Thereon, in *Halmos* v. *BCPA*

An action was brought against defendant BCPA, in the U. S. District Court, for the death of one of the other passengers on the same flight. *Halmos* v. *BCPA,* #34123, N. D. Calif. March 9, 1959. In the first trial there, a jury verdict for defendant was set aside; in the new trial, a verdict for $35,000 was returned based on wilful misconduct of the defendant, including the pilot; judgment entered thereon was not appealed.

The record in the case at bar contains no evidence relied on by defendants, which was not in the earlier case. Also, all evidence against defendant in the earlier case is included, with additional such evidence, in the present record.

G. The Decisions Below

Pertinent to the present Petition are four issues decided below*:

1. *Collateral Estoppel.* After the District Court rejected plaintiffs' contention that the carrier was estopped by the prior final judgment against it, in *Halmos,* from relitigating in the present case the issue of wilful misconduct, the U. S. Court of Appeals for the Ninth Circuit handed down its conflicting decision in *U. S.* v. *Weiner,* 335 F. 2d 379, 404, adopting and affirming the carefully considered opinion in *U. S.* v. *United Airlines,* 216 F. Supp. 709, 718-25. The Court of Appeals below has declined, we contend erroneously, to follow the Ninth Circuit's holding that in a multi-accident crash, the carrier is bound by the first determination, as a matter of federal law.

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*The U. S. District Court's jurisdiction is based on removal from the State Court because of diversity of citizenship, the matter exceeding $10,000 exclusive of interest and costs. 28 U. S. C. §§ 1332, 1441.

2. *Unlimited Liability.* After the District Court reserved decision on plaintiffs' motion for a directed verdict, it denied plaintiffs' request to instruct the jury that wilful misconduct included "acts of carelessness without regard of the consequences" (R. 1992-3). However, the District Court granted plaintiffs' motion for judgment n.o.v. on the ground that wilful misconduct had been shown as a matter of law (D. App. 113a-119a). The Court of Appeals reversed on the grounds that: (a) the Trial Court had erred in holding that "wilful misconduct is '*carelessness* without any regard for the consequences'" (346 F. 2d at 537), and (b) the jury could reasonably find no misconduct on either standard (346 F. 2d at 537). We contend that, as a matter of law, the District Court was right as to both the standard and its application and that the Court of Appeals was in error even in the application of the erroneous standard it laid down.

3. *Limited Liability.* The Court of Appeals has even held that the jury could reasonably find that defendants had shown that they and their agents had taken all measures necessary and possible to avoid the accident (thereby relieving them of limited liability up to $8300) in face of defendants' contrary concession which was compelled by the record (supra, p. 5, footnote).

4. *Discretionary New Trial.* The District Court, in the exercise of discretion, ordered a new trial on all issues (conditionally, *viz.* if its judgment n.o.v. be reversed), not only because the verdict was against the weight of the evidence, but also because the jury had been misled, particularly by defendants' counsel. The Court of Appeals, in a decision probably without precedent, reversed this direction as an abuse of discretion. We believe the decision is in error in that the Court allowed dissatisfaction with the

Trial Judge's view of the law to carry over into an unwarranted rejection of his sound discretion (346 F. 2d, at 535 and 539, footnote 5).*

REASONS FOR GRANTING THE WRIT

1. The holding of the U. S. Court of Appeals for the Second Circuit, below, that the carrier was not bound by the prior final decision of another U. S. District Court (*supra*, p. 8) on substantially the same evidence that the crash in question resulted from wilful misconduct attributable to the carrier, is in direct conflict with that of the Court of Appeals for the Ninth Circuit in *United States* v. *United Airlines, Inc.*, 216 F. Supp. 709, 718-25 (E. D. Wash. 1962) aff'd on the opinion below sub. nom. *United States* v. *Weiner*, 335 F. 2d 379, 404 (C. A. 9), cert. dism. 379 U. S. 951.

There is no distinction of substance between the two cases. *United Airlines* was also a multiple accident, diversity jurisdiction case involving an airplane crash; the evidence in the two successive federal suits was substantially the same; adopting an extensive, carefully considered opinion the Court of Appeals for the Ninth Circuit held that as a matter of federal law, the prior federal judgment was final for purposes of res judicata or collateral estoppel, even though the plaintiffs in the successive suits were different, since there was no reason to adhere any longer to the discredited notion of "mutuality of estoppel".

The Court of Appeals below refused to decide whether or not federal law applies. 346 F. 2d, at 540. That it does, was not only the decision above of the Ninth Circuit based

*There is no issue of Trial Judge prejudice in this case. Any allusion to the subject refers only to the Trial Judge's candid distaste for the obsolete public policy of limited liability. The State Department has just denounced the Warsaw Convention on this very ground. N. Y. Times, Nov. 16, 1965, p. 94.

on the facts present here as there that both successive suits were in federal courts. Present in our case is the additional fact that the issues turn on the interpretation and application of a U. S. treaty.

The Court of Appeals below also speculated that the carrier may not have put forth its "full efforts" in the prior suit. 346 F. 2d, at 541. But such speculation is contradicted by the record: defendants introduced no new evidence on the issue of wilful misconduct; and on the issue of limited liability, the defendant put in no "effort" in the present case, admitting as it did that it had shown no excuse for the crash (supra, p. 5, footnote). Besides, the very purpose of the judicial policy underlying collateral estoppel is to foreclose the kind of speculation the Court of Appeals indulged in.

The double conflict between the Second and Ninth Circuits— (a) does federal law apply where the successive suits are in U. S. District Courts and (b) does it call for invoking collateral estoppel where the carrier has nothing to offer in the second suit over what it offered in the first— as well as the novel and important question whether federal law so requires where the substantive issue turns on U. S. law, should be resolved by this Court.

2. The Court of Appeals, in reversing the District Court's discretionary order for a new trial, has exceeded its power and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision to assure plaintiffs their 7th Amendment right to trial by an unprejudiced jury. The Court of Appeals' action is unprecedented in the federal system and in the circumstances of this case is a shocking denial of justice.

Lind v. *Schenley Industries, Inc.*, 278 F. 2d 79 (C. A. 3) was one of the few cases which upset a new trial order,

but the new trial had been granted only because the verdict (for plaintiff) was allegedly against the weight of the evidence. Biggs, C.J., for the majority, held that the appellate court could review such an order to satisfy itself that the trial court had not invaded the province of the jury but that such an order

> "may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence . . . In the latter instances, (2) supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial." (*id.*, 90)

In our case, although the District Court granted the new trial, not only because the verdict was against the evidence, but also because the jury was misled, e.g. by evidence improperly admitted and by prejudicial statements by counsel, the Court of Appeals below failing to make the 'sharp distinction' laid down by the Third Circuit, substituted its own judgment for that of the District Court as to both categories of grounds for the new trial.

(a) ***The jury was likely to have been misled by numerous, serious misstatements of defendants' counsel, by erroneously admitted, prejudicial evidence on the crucial matter of reliability of the safety equipment, and by a confusing charge on the meaning of wilful misconduct.*** Defendants'

counsel made seriously prejudicial statements to the jury about the evidence. E.g.

(1) That the ILS Outer Marker "has nothing to do with the geographical position" (D. App. 176a-178a). Undisputedly, the whole purpose of the ILS Outer Marker was to establish geographical position (D. App. 45a-47a; App. 94a-97a, 104a-105a, 108a-111a).

(2) That "when he received the proper signals, he started the letdown, he intentionally went into those clouds" (D. App. 181a). There is no evidence he received the proper signals; in fact, all the evidence is to the contrary (App. 101a, 111a, 103a-105a; D. App. 44a).

(3) That "we know he (the pilot) was at the proper place for the procedure turn" (D. App. 194a). This is directly contradictory to their own admission. (App. 25a-26a, 101a, 111a, 103a-105a, D. App. 44a).

(4) By insinuation, that the radio transmitters at the ILS Outer Marker and the plane's radio navigation receivers of signals therefrom were not working normally (D. App. 131a-132a, 135a, 136a-138a). The undisputed evidence was that they were working normally (D. App. 85a-90a, 367a-368a, items 1, 2, 3, 6 and 7).

(5) By insinuation, that a "mistake had been made . . . on the part of radio facility maintenance" (D. App. 196a). This is contradicted by the record (D. App. 85a-90a, 368a, item 7).

Indeed, defendants' counsel went so far as to manufacture non-existent testimony. He told the jury that plaintiffs had not asked questions of witness Andrews, a former

CAB employee, as to the cause of the accident, because they were afraid of the answers, which would be to the effect that no one knows how the accident occurred (D. App. 147a). This was highly prejudicial; it went to the core of the case. It was unfair, also, because his conclusions as a CAB investigator were excluded by statute (D. 155a) and defendants had already indicated (D. App. 156a) that they would not waive this exclusionary rule.*

Evidence likely to mislead the jury was cited to it on the critical matter of reliability of safety equipment (D. App. 139a-141a). This was a distinct basis for the District Court's exercise of discretion (D. App. 141a) which the Court of Appeals overlooked (346 F. 2d, at 541) although called to its attention by brief before decision and by petition for reconsideration. As the District Court held, such evidence was "too remote" in time to be admissible (D. App. 141a). That its admission was prejudicial to a fair verdict was within the sound discretion of the District Court to determine; although it had no bearing on the issue, the jury might easily have been misled by it into mistrusting the reliability of the ILS instrument landing system.

The charge to the jury was misleading in a double respect. First, the District Court denied plaintiffs' request to instruct the jury that wilful misconduct covers not only acts accomplished with deliberation, but also acts of care-

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*The Court of Appeals gave as one ground for its reversal of the new trial order that objection was not made to all the prejudicial remarks when uttered. 346 F. 2d, at 542. However, that ground is clearly untenable: (i) The District Court relied on such prejudicial remarks as a basis for granting a new trial in the exercise of discretion and plaintiffs may therefore rely on them to support the order; *Helvering* v. *Gowran*, 302 U. S. 238, 245-7. (ii) The District Court cautioned counsel against interrupting opposing counsel's summation (R. 1844).

lessness without regard of the consequences (R. 1992-3). Second, the charge given was internally confusing.*

(b) *A new trial is required in the interests of justice* (if the n.o.v. for the plaintiffs is not to be reinstated). Defendants' liability has already been found by verdict and judgment in *Halmos, supra.* Moreover, in this case, defendants refused to obey the District Court's order to permit discovery of pertinent records in their possession to plaintiffs (App. 200a). They had intentionally refused to obey the CAA's directive to pass on to the pilots the 3500 foot altitude requirement. The accident would not have occurred if the pilot had received and obeyed this safety instruction. Defendants admitted that they had not proved that they and their agents had taken all necessary measures to avoid the crash or that it was impossible for them to take such measures (supra, p. 5, footnote); in the face of this concession requiring at least a judgment for $8300 *for* the widow and children, the Court of Appeals has dismissed the complaint, resulting in the imposition *against* them of a judgment for $7,741.25 costs! This is so unjust as to create disrespect for our judicial processes.**

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*The charge started out with the enunciation of two ingredients, both together necessary for wilful misconduct, distilled from *Pekelis* (219 F. Supp. at 360; D. App. 15a). The Trial Court then gave a definition of wilful misconduct substantially different from that originally stated and enumerated four elements in that definition (219 F. Supp. at 360; D. App. 16a-17a).

The Court proceeded to give examples of wilful misconduct. It then concluded with a further definition, which was ambiguous as to whether the two separate ingredients mentioned in the charge at 15a must be found together or whether either one would meet the definition of wilful misconduct (219 F. Supp. at 363; D. App. 24a).

**The Court of Appeals says it was not a judicially conclusive concession and speculatively attributes jury confusion to the rhetoric of plaintiffs' trial counsel (346 F. 2d, at 542). But this does not negate the need for a new trial in the interests of justice and an $8300 judgment as the minimum in the light of defendants' considered admission based on the overwhelming evidence and contradicted by none. To say, as the Court of Appeals does, that the "plaintiffs cannot now complain", is to make a game of justice.

The Court of Appeals' insensitivity to the discretion of the District Court in protecting plaintiffs' constitutional right to trial by an unprejudiced jury, to the requirements of the federal air safety regulations, and to the compensation policy of the treaty, all call for the supervisory intervention of the Supreme Court.

3. The liability of air carriers for violating federal en route altitude and instrument landing, safety regulations has not been passed on by the Supreme Court. This is an important matter which should be settled by this Court, particularly because on its correct construction depends in large measure (a) the integrity of the Federal government's air safety regulations and the safety of thousands of Americans daily engaged in international flights as passengers and members of flight crews, and (b) effectuation of the public policy to award just compensation to the families of passengers killed in such flights.

(a) *As to limited liability.* Article 17 of the treaty imposes, for the purposes of the limited damages (up to $8300) granted by Article 22, "absolute liability . . . regardless of fault" unless the defendant carriers can affirmatively show, under Article 20, that they "have taken all necessary measures to avoid the damages or that it was impossible . . . to take such measures" (D. App. 309a-310a; *Grey* v. *Amer. Airlines*, 227 F. 2d 282, 285 (C. A. 2)).

The Court of Appeals in effect characterized defendants' conduct at headquarters in not transmitting the CAA ruling as "negligence" (346 F. 2d, at 538). It did not cite any evidence that satisfied this burden of the defendant carrier; there is none; and the defendants admitted it (supra, p. 5, footnote). The Court of Appeals' reversal and dismissal of the complaint was plain error.

(b) *As to unlimited liability; pilot's misconduct.* Under Article 25, the arbitrary maximum of Article 22 is removed

where the crash resulted from the carrier's or pilot's wilful misconduct or its judicial equivalent. This has been interpreted to include "carelessness without regard for the consequences" in accordance with the explicit "legislative" history leading to the formulation of the clause, e.g. *Pekelis* v. *TWA,* 187 F. 2d 122, 125 n.2 (C. A. 2); *Amer. Airlines* v. *Ulen,* 186 F. 2d 529 (C. A. D. C.); yet the opinion of the Court of Appeals below, in conflict with these authorities, rejects this test, 346 F. 2d 532, 536-7, in favor of the requirement, *later* inserted in the Hague amendment and *not adhered to by the United States,* of "knowledge that damage would probably result" *id.* This was also plain error. See Drion: *Limitation of Liabilities in International Air Law* (1954), p. 233:

> "Realization of a 1% chance, that an aircraft will crash as a result of a certain act or omission may be sufficient to make the decedent's conduct 'wilful misconduct' in the sense of Article 25."*

The extreme hazards of flying require stringent safety regulations and meticulous compliance therewith; this is especially so with respect to government-prescribed safe altitudes and government-prescribed instrument landing procedures for bringing planes down safely through clouds in mountainous terrain.

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*The Court of Appeals evidently thought that because the pilot was dead, the jury should be free to speculate that he believed that despite his violation of the safety clearance, a crash was not "probable", 346 F. 2d, at 536. But such speculation should not be permitted, especially since defendant admitted that: "the pilot knew that he was over mountainous terrain and also knew the perils attendant upon an imprecise instrument let-down." (Deft's Brief below, p. 35). To a layman, the word "probable" means more likely than not—more than 50% probable. See, e.g. Webster's *New International Dictionary,* 2d Ed. (1959) entries under "probable" and "probably". Playing "Russian roulette", with one of six chambers of the revolver loaded, is not wilful or any other kind of misconduct under the standard set by the Court of Appeals in the decision below.

In the present case, the undisputed evidence showed that these regulations, having the force of law and known to the carrier, including the pilot, were flouted, in the absence of any emergency warranting departure from them. The pilot had descended into the clouds without receiving the unique navigational signals which he knew were the only lawful means of his establishing that he had passed over the mountains and was in the lawful, safe, descent area. Neither "confusion as to his actual position"* nor even a momentary clear view of the terrain through the cloud bank could exculpate him from the legal duty of passing over the ILS Outer Marker before descending. In addition carrier headquarters had deliberately not informed him of the CAA requirement that he fly at 3500 feet in the area upon receiving a "500 feet on top" clearance. Had either requirement been observed, the crash would have been avoided.

The District Court held that these facts gave rise, as a matter of law, to unlimited liability under the Warsaw Convention for the fatal crash caused by such violation of government safety regulations: liability for the full damages because the crash was caused by wilful misconduct or its judicial equivalent (Article 25). The District Court held that the "test is an objective one" 219 F. Supp. at 325. Although the Court of Appeals conceded that wilful misconduct is not "an entirely subjective matter", it permitted the jury to speculate "as to what a man in the pilot's position should have done" because "we cannot know all the facts needed to make any kind of judgment, subjective or objective". 346 F. 2d, at 538, n. 4. The Court's hodgepodge of a 'subjective and objective' test is also plain error.**

*The irony is that the entire purpose of the ILS is to preclude confusion as to actual position.

**Prosser, *Law of Torts* (3d Ed. 1964) states, most pertinently in light of the fact that in fatal airplane crashes the pilot, crew and passengers will not be available to testify, that "an objective standard

What the pilot "should have done" but did not do was clear from the undisputed evidence, which the Court of Appeals overlooked. Thus, the Court of Appeals ignored the critical concessions of defendants and their experts that: the pilot did not pass over the ILS Outer Marker before descending into the clouds, which, as the pilot knew, was required by the prescribed instrument landing clearance; that, as the pilot knew, this prescribed procedure required that he establish such passing over in only one way, *viz.* by receiving two unique signals which were receivable there and nowhere else; and that the equipment of the ILS Outer Marker for transmitting and of the plane for receiving such signals was in proper working order at the time of the accident (D. App. 367a-368a, items #1, 2, 3, 6, and 7). The Court of Appeals thus overlooked the *necessary consequence* from these undisputed facts (not, as the Court stated, merely "inferences to be drawn from essentially circumstantial evidence" 346 F. 2d, at 538) that the

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must of necessity in practice be applied" in determining whether there has been wilful misconduct and, accordingly, that wilful misconduct is established

> "in any case where it is clear from the facts that the defendant, *whatever his state of mind, has proceeded in disregard of a high degree of danger,* either known to him or *apparent to a reasonable man in* his position." (Footnotes omitted. Underscoring supplied, p. 189)

Harper and James are in accord (*Law of Torts,* Vol. 2):

> "It is submitted that *no particular state of mind should be required for a finding of wanton or wilful misconduct. If defendant's conduct, in the light of circumstances which he knew or should have known, involved a high degree of manifest danger, that should be enough without regard to defendant's mental attitude.* Thus if the driver of a trailer truck undertakes to pass another trailer truck as they both near the brow of a hill on a two lane highway, it should make no difference at all whether the mind of the overtaking driver was filled with anxious solicitude for his fellow travelers or with an utter indifference to probable danger to them." (Footnotes omitted) (Underscoring supplied, pp. 954-5).

pilot descended without having received those unique, unmistakeable signals, thereby violating the safety clearance, and thus hit the mountains, which that safety clearance was specifically designed to avoid. By completely overlooking the critical undisputed evidence and degrading a necessary logical consequence into a merely possible inference, the Court of Appeals again committed plain error.

The alternative basis for the decision below is that even if the pilot descended, in deliberate violation of his clearance, that was not necessarily wilful misconduct. 346 F. 2d, at 537-8. Such a holding is error of law. It permits the pilot to substitute his own opinion for the law of the land. This is subversive of the U. S. Government's entire air-safety public policy and is also plain error: " 'wilfully' means a thing done without *ground* for believing it is lawful." *Brown* v. *Bullock,* 294 F. 2d 415, 420 (C. A. 2 *in banc;* underscoring supplied). There is no basis in the evidence for an inference that the pilot, although not receiving the signals, had any *ground* for believing he had. If the Court of Appeals sanctioned such speculation, it erred.

Any trained pilot would know that violation of the clearance exposed all on board to grave risk of death or serious injury. Of course, it wasn't likely that the pilot tried to commit suicide and murder 18 others, but this is all there is to support the Court of Appeals' decision.* Surely, that presumption shouldn't be enough to exculpate the carrier.

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*This "evidence", which the Court says (346 F. 2d at 537-8) shows the pilot may have thought he was in the proper position, has no tendency to show confusion as to the prescribed way of getting there. Grant that the pilot "was making a proper landing . . . *apart from location*"; grant that he did not intend to commit suicide; grant that there may have been some radio communication trouble—which had nothing to do with the separate radio *navigational* instruments involved in the instrument approach. Grant all these—the inescapable fact remains that the pilot let down into the clouds knowing he had

(c) *As to wilful misconduct at headquarters.* The Court of Appeals was also plainly in error in holding that deliberate refusal to follow an order of the CAA "cannot be characterized as wilful misconduct; at best it was negligence arising out of an honest difference of opinion". 346 F. 2d, at 538. There can be no honest difference of opinion with the law. To violate the law is misconduct. To violate the law deliberately, after explicit notice, is wilful misconduct.*

4. An important question of Federal law that has not been, but should be, settled by this Court is the meaning of Article 3(2) of the Warsaw Convention.

Article 3(1) sets forth rigorous requirements of what a ticket must contain, including, inter alia, a statement of the agreed stopping places (Clause c). In this case, the ticket omitted Honolulu and the accident occurred on the leg from Honolulu to San Francisco.

In order to enforce the requirements of Article 3(1), Article 3(2) provides that unless "a passenger ticket" is

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not received the prescribed signals and so crashed; that was wilful misconduct as a matter of law, under *Pekelis* and *Brown, supra.*

The Court's statement about not "likely to have tried to land without having received the signals" (at 538) is ambiguous. There was no evidence he had received the signals, *supra,* pp. 19-20; so what is left is the bare presumption against suicide and homicide.

*There is no substance to the suggestion (346 F. 2d, at 538) that the CAA letter, directing BCPA to communicate to its pilots the CAA's official interpretation of its own regulation, should have been excluded as hearsay. That letter, received by the defendant from the CAA, constituted notice to the defendant of the law, which it wilfully breached.

The Court of Appeals also overlooked (*id.*) the fact that misconduct at headquarters was urged at the trial (App. 33a-36a including references therein). The District Court sustained this ground (Supp. Op. in D App. 200a, first sentence and 201a, item 4), so it was plainly available to plaintiffs to support the District Court's judgment. *Helvering* v. *Gowran,* 302 U. S. 238, 245-7.

delivered by the carrier to the passenger, the carrier loses its treaty defenses of limited liability or exculpation. The complete omission of an agreed stopping place is more than a mere irregularity because each landing and ascent materially increases the passenger's risk and failure to notify him thereof deprives him of the opportunity to protect himself therefrom e.g. by refusing to take that flight or by insurance. Such omission means therefore that there has been a failure to deliver to the passenger a passenger ticket within the requirement of Article 3, exposing the carrier to absolute liability under the Convention. *Mertens* v. *The Flying Tiger Line,* 341 F. 2d 851 (C. A. 2); *Warren* v. *Flying Tiger Line,* F. 2d (C. A. 9, 10/25/65) (the first so holding where the ticket was not handed to passenger until he was already on plane and the second so holding where the ticket was handed to him at foot of boarding ramp).*

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

T. ROLAND BERNER
Attorney for Petitioners

Of Counsel:

M. VICTOR LEVENTRITT
AARON LEWITTES
SIDNEY BENDER

November 17, 1965.

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*This question has been answered favorably to the carrier by the Second Circuit (*Grey* v. *Amer. Airlines,* 227 F. 2d 282, 284); so raising it below would have been a futile act; but it is now up for decision by the Third Circuit (*Berguido* v. *Eastern Airlines,* #15156, recently argued and now *sub judice*).

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued December 7, 1964 Decided June 9, 1965.)

Docket No. 29033

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of the Estate of William Kapell, deceased,
Plaintiffs-Appellants-Appellees,

—against—

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp. and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as Qantas Empire Aviation, Ltd., a Foreign Corporation,
Defendants-Appellees-Appellants.

Before:

WATERMAN, MOORE and KAUFMAN,
Circuit Judges.

MOORE, *Circuit Judge:*

This is a diversity action for damages for wrongful death arising out of an airplane accident on October 29, 1953. In 1953 a pilot for defendant British Commonwealth Pacific Airlines, Ltd. (BCPA), an Australian corporation,

in a plane coming from Honolulu, began an instrument landing, during which operation it crashed against a mountain near the San Francisco, California, airport. All aboard were killed, including plaintiffs' deceased, the noted pianist William Kapell.

The flight having been international, BCPA and defendant Qantas Empire Aviation, Ltd. (Qantas) claimed that liability was limited by the Warsaw Convention,[1] under which plaintiffs could recover no more than $8,291.87, unless BCPA had been guilty of "wilful misconduct."[2] If, on the other hand, BCPA had taken all necessary means to avoid the accident, or if that were impossible, then BCPA would not be liable to plaintiffs for any amount.[3]

After a jury trial in 1961 before Judge Willis Ritter, the jury found for defendants on all issues; no damages were awarded. Plaintiffs moved for judgment notwithstanding the verdict or for a new trial, and two years later Judge Ritter granted judgment for plaintiff as to liability, ordering a new trial only as to damages. He also ordered a conditional new trial on all issues if the judgment n.o.v. were reversed on appeal. 219 F. Supp. 289 (S. D. N. Y. 1963). Defendants object to both determinations.

After a trial in 1964 before Judge McLean a jury found damages of $924,396. Plaintiff moved for the addition of pre-judgment interest from date of death—1953—to date of judgment. The motion was denied, 230 F. Supp. 240 (S. D. N. Y. 1964), and plaintiffs appeal.

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[1]Convention and Additional Proctocol with Other Powers Relating to International Air Transportation, October 12, 1929, art. 22, 49 Stat. 3000 (1934).

[2]*Id.* at art. 25.

[3]*Id.* at art. 20.

Opinion of Court of Appeals

The Pleadings

As a first cause of action against BCPA, the complaint alleged in substance that the crash "was caused solely by the wilful misconduct of defendant BCPA, its agents and employees, in and about the management, operation, control and maintenance of the aforesaid airplane, . . ." Other causes of action alleged negligence on the part of BCPA. These causes of action were repeated against BCPA "now doing business as Qantas Empire Aviation, Ltd." on the theory that Qantas became a successor in interest to, and assumed the obligations of, BCPA. British Overseas Airways Corp. (BOAC) was made a defendant in two causes of action on the theory that BOAC was negligent in choosing BCPA as the air carrier to transport Kapell. Except for certain factual admissions not in dispute, BCPA (and BCPA d/b/a Qantas), denied liability generally although admitting that in its liquidation it had transferred only certain assets to Qantas. For an affirmative defense BCPA (and Qantas) alleged that the flight was in "international transportation" and that the "Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol," referred to herein as the "Warsaw Convention" or "Convention," limited its liability to each passenger to 125,000 francs ($8,291.87).

The Trial

The trial before a jury consumed thirteen days. Some thirty-seven witnesses testified in person or by deposition. Their testimony covered a range from technical airplane piloting and landing procedures, the rules and regulations pertaining thereto, weather conditions, the sound of the plane and the crash, to Kapell's then and future earning capacity.

At the conclusion of plaintiffs' case, Qantas moved for a directed verdict, which motion was denied. Decision was reserved until after verdict on a similar motion at the end of the entire case. The many issues of fact were submitted to the jury in a lengthy charge. The jury returned a verdict "Unanimous for the defendant."

The Charge

The trial court first expounded its views of the effect of the Warsaw Convention. After mentioning the limited damages aspect of the Convention, the Court charged, "If what the pilot or crew did, or failed to do, was 'wilful misconduct,' there are no limits imposed by the Warsaw Convention upon the damages that may be recovered." The court then proceeded in a charge most favorable to plaintiff to define "wilful misconduct" as it might be found in a series of hypothetical situations in the operation of the airplane while attempting to land, including the comment that "it may be that a jury would feel justified in coming to the conclusion that some relatively minor breach of a safety regulation amounts to 'wilful misconduct,' although it would not do so in places and on occasions when the consequences of such an approach would be much less serious."

The jury were told that it was their function not only to take into consideration "all of the facts and circumstances in proof" but also all the inferences fairly and reasonably to be drawn from the facts as proven. Even on the question of the pilot's knowledge in the definition of "wilful misconduct" the jury were instructed that proof thereof did not have to be by direct evidence but that they had "a right to infer that the pilot or flight crew in charge of

the aircraft had such knowledge or would have had such knowledge." As the court finally summarized the case, in addition to weighing the evidence, the circumstantial evidence and all inferences therefrom, the jury were to hold the defendants "liable to the plaintiffs for the damages caused by that death without limitation" if the defendant "knowingly and intentionally violated any of the Civil Air Regulations or the landing instructions from the San Francisco Approach Control Tower." The jury was to apply the law "to the facts which you may find have been established in this case."

The jury acting upon these instructions found for the defendant. Over two years later the court, upon the same proof as had been submitted to the jury for their resolution of the facts, directed judgment n.o.v. in favor of plaintiffs and ordered a new trial on the issues of damages only.

The Court's Opinion

In a lengthy opinion, the court reviewed its version of the facts and by granting plaintiffs' motions, in effect, substituted itself for the jury and drew its own inferences from the facts.

Some twenty printed pages are given to an analysis of the Warsaw Convention. Reference is made to various comments of German, British, Luxembourg, Italian, French, Brazilian and Swiss delegates to the Warsaw Conference with respect to "dolus," "dol," and "faute lourde" and the translation of these words into our law as "wilful misconduct" (a phrase accepted and used by the court in its jury charge). However, the impression is gained from the opinion that to the court "the Warsaw Convention was a device by which to subsidize the *then* infant industry of

international air transportation" and that "it is a strange concept to us in the United States that the subsidy should be taken out of the widows and orphans of the passengers." 219 F. Supp. at 322-23.

The Interlocutory Judgment

The court not only directed a judgment against defendant "on the issue of liability" but also, in the alternative, ordered a new trial on all issues "if the judgment *non obstante veredicto* is set aside on appeal."

The Primary Appellate Issue

The primary issue to be resolved upon this appeal is whether the trial court was justified in setting aside the jury's verdict in favor of defendant and, assuming the jury's role as fact finder, granting judgment to plaintiffs.

The separate roles to be played by the jury with respect to the facts and by the court with respect to the law have been rather firmly settled for many generations. As the Supreme Court said in *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U. S. 29, 35 (1944):

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [citing cases] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict

> merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

This admonition was re-emphasized in *Lavender* v. *Kurn*, 327 U. S. 645, 653 (1946):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

No useful purpose will be served by even a resume of the many factual issues outlined in the court's charge or raised by the testimony set forth in great detail in the opinion of 86 pages. Suffice it to say that the trial court presented the factual issues to the jury in the charge, giving to them the broadest leeway to draw such inferences as to wilful misconduct as might be warranted. They obvi-

ously resolved the facts and inferences therefrom as not supporting wilful misconduct.

I. *"Wilful Misconduct" as a Matter of Law.*

In granting plaintiffs' motion for judgment n.o.v., Judge Ritter held that the evidence established "wilful misconduct" as a matter of law; *i.e.*, that the only conclusion a reasonable jury could have reached was that the defendants were guilty of wilful misconduct. See, e.g., *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62-63 (1949); *Marsh* v. *Illinois Cent. R. R.*, 175 F. 2d 498, 500 (5th Cir. 1949); *Blum* v. *Fresh Grown Preserve Corp.*, 292 N. Y. 241, 245-46, 54 N. E. 2d 809, 810 (1944).

A. *The applicable standard of wilful misconduct.*

1. *As stated by prior decisions.* Although it is immaterial to the jury's resolution of the facts, the court in its opinion was in error in concluding that the Second Circuit does not require knowledge that damage would probably result. The charge of the trial court in *Pekelis* v. *Transcontinental & W. Air, Inc.*, upheld by this court in 187 F. 2d 122, 124, (2 Cir.) *cert. denied*, 341 U. S. 951 (1951), and referred to by the trial court in the present case, was that:

> "wilful misconduct *is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it* may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences . . ., [or] the intentional omission of some act, *with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act* in a manner

> from which could be implied reckless disregard of the probable consequences of the omission . . ." (Italicized portions omitted by trial court below.)

We held that an instruction requested by the plaintiff in that case was properly denied

> "because it failed to state that the employee must either have known that the . . . [test] was necessary for safety, or his duty to make it must have been so obvious that in failing to make it his conduct would be reckless, rather than merely negligent.*" (*Id.* at 125 (footnote omitted).)

Then, in *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282, 285 (2d Cir. 1955), *cert. denied,* 350 U. S. 989 (1956), Judge Medina "in accordance with precedent" approved a charge requiring "proof of 'a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.'" To like effect was the charge upheld in *American Airlines, Inc.* v. *Ulen,* 186 F. 2d 529, 533 (1949), which said that it would be wilful misconduct if the carrier

> "wilfully performed any act with the knowledge that the performance of that act was likely to result in injury to a passenger, or performed that act with reckless disregard of its probable consequences; . . . the mere violation of those [safety rules and regulations], * * * even if intentional, would not necessarily constitute wilful misconduct, but if the violation was intentional with knowledge that the

violation was likely to cause injury to a passenger, then that would be wilful misconduct, and likewise, if it was done with a wanton and reckless disregard of the consequences."

See also *Koninklijke Luchtvaart Maatschappij N. V. KLM Royal Dutch Airlines, Holland* v. *Tuller*, 292 F. 2d 775, 779-82 (D. C. Cir.), *cert. denied*, 368 U. S. 921 (1961).

2. *As stated by the trial court.* After excerpting only parts of the charge upheld in *Pekelis, supra,* the court concluded that "the Second Circuit does not" require knowledge that damage will probably result, 219 F. Supp. at 323, as is required by the Hague Protocol—an amendment to the Convention which is not in force in the United States. Rather, the court indicated approval of a statement that wilful misconduct is *"carelessness* without regard for the consequences," *ibid.* (emphasis in original), and stated that to establish wilful misconduct "it is enough that he [the pilot] realizes, or from the facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless." *Id.* at 325-26.

B. *Wilful misconduct in the plane's approach.*

There is no justification for the conclusion that the *only* permissible inference from all the evidence was that the pilot had been guilty of wilful misconduct—whether under Judge Ritter's standard or under that stated by the prior cases.

Defendants argue that a reasonable inference for the jury to have made was "that the pilot, from some inscrutable cause, became confused as to his actual position and

commenced his let-down from a point he believed to be the proper one." If that were so, wilful misconduct would not have been established under any standard. We cannot doubt that a jury could reasonably have thought it so on this record. The evidence shows that the pilot quite possibly thought he was making a proper landing—in most respects he was, apart from location. There is evidence from which the jury could have inferred that the pilot would not have been likely to have tried to land without having received the requisite signals, thereby violating his clearance. The evidence also suggests that there may have been some radio communication trouble.

Against this, plaintiffs argue that, because of the technical and electronic characteristics of the indicators involved —which they assert to have been operating properly—the pilot could not have received all the signals which he was required by his clearance to receive before beginning his let-down. Because of this, they say, the pilot *must* have let down knowing that he had not received the proper signals, or with reckless disregard for whether or not he had. However, all these questions depend upon inferences to be drawn from essentially circumstantial evidence. Those who alone could provide direct evidence as to what in fact led the pilot to act are, unfortunately, not able to do so.[4] One can hardly imagine a clearer case in which such questions should have been left to the jury. See, e.g., *LeRoy* v. *Sabena Belgian World Airlines*, 344 F. 2d 266, 271 (2d

[4]We do not mean to suggest that "wilful misconduct" is an entirely subjective matter, see Prosser, *Torts* 189 (3d ed. 1964), but merely that we cannot know all the facts needed to make any kind of judgment, subjective or objective, as to what a man in the pilot's position should have done. The fragmentary reconstruction that can be made permits inferences other than wilful misconduct. That is enough to let a jury's verdict stand.

Cir. 1965). We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct. Once the case went to the jury, its verdict should not have been upset if reasonable men could find in defendant's favor, as they certainly could here. *Markusen* v. *General Aniline & Film Corp.*, 16 F. R. D. 455 (S. D. N. Y. 1954), *aff'd on the opinion below*, 221 F. 2d 479 (2d Cir. 1955); see, e.g., *Lavender* v. *Kurn*, 327 U. S. 645, 652-53 (1946); *O'Connor* v. *Pennsylvania R.R.*, 308 F. 2d 911, 914 (2d Cir. 1962); 2B Barron & Holtzoff, *Federal Practice & Procedure*, § 1075 at 378 (1961).

C. *Wilful misconduct at headquarters.*

Plaintiffs also urge that as a matter of law there was wilful misconduct at BCPA headquarters in the failure to instruct pilots as to a CAB letter interpreting clearance regulations concerning minimum altitudes in approaching San Francisco. Even if the letter itself were admissible, BCPA's conduct cannot be characterized as wilful misconduct; at best it was negligence arising out of an honest difference of opinion. However, this theory is not available to upset the jury's verdict. It was apparently not urged at trial and the jury was not charged about it. The trial judge made no ruling on it. The only semblance of support is a statement in Judge Ritter's "Supplemental Opinion" that from BCPA's failure to excuse its nonproduction of certain documents it was permissible to infer that the failure was deliberate and that "such documents would be unfavorable to defendant, BCPA, on such issue [wilful misconduct]." In particular, BCPA failed to produce a file relating to prescribed approach procedures, although an unspecified number of documents in that file

were produced. Even if the non-production could establish that BCPA failed for some reason—perhaps a justifiable one—to tell pilots of the CAB interpretation, as we have said, that could not establish wilful misconduct as a matter of law under the theory of the case.

II. *Collateral Estoppel.*

Plaintiffs argue that defendant BCPA is collaterally estopped from relitigating the question of liability for "wilful misconduct" because of a prior judgment against it in a case involving a different passenger killed in the same crash. *Halmos* v. *British Commonwealth Pac. Airlines, Ltd.*, No. 34123, N. D. Cal. March 9, 1959. An action by Kapell's estate against BCPA and Qantas seeking $750,000 had been consolidated with *Halmos*. Prior to the first trial, summary judgment was granted in favor of Qantas, and the Kapell action against BCPA was dismissed on stipulation. After a jury in *Halmos* had returned a verdict for BCPA, Judge Ritter, sitting in California by designation, granted plaintiffs' motion for a new trial. After the second trial, also before Judge Ritter, a jury found for plaintiffs and assessed damages at $35,000 in contrast to $500,000 sought on the complaint. BCPA did not appeal. In 1954, when the Kapell action in California was begun, similar actions were also begun by Kapell's estate in the Supreme Court of the State of New South Wales, Australia, and in the Supreme Court of the State of New York. Service of a summons on the present defendants in the latter action was upheld in *Berner* v. *United Airlines, Inc.*, 2 Misc. 2d 260, 149 N. Y. S. 2d 335 (Sup. Ct.), *aff'd*, 3 A. D. 2d 9, 157 N. Y. S. 2d 884 (1st Dept. 1956), *aff'd*, 3 N. Y. 2d 1003, 170 N. Y. S. 2d 340, 147 N. E. 2d 732 (1957). Thereafter in 1959 a complaint was

served and the defendants had the action removed to the Southern District of New York.[5] It is this action that gave rise to these appeals.

Application of the doctrine of collateral estoppel raises many questions. Plaintiffs suggest that the lack of mutuality of estoppel (BCPA could not assert a judgment against Halmos as a bar to this action) need be no barrier here under our recent decision in *Zdanok* v. *Glidden Co.*, 327 F. 2d 944 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964), 64 Colum. L. Rev. 1141. However, it is not altogether clear that *Zdanok* would govern the question of collateral estoppel in this case. *Zdanok* involved two federal court cases

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[5]When the instant case came on for trial in the Southern District, it was assigned to Judge Ritter, then sitting here by designation. At the beginning of the trial, BCPA moved that he disqualify himself on the ground of personal prejudice against it, citing 28 U. S. C. A. § 144 which provides that

> whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein . . .

Judge Ritter declined to do so. Defendants then petitioned this court to grant prohibition or mandamus on the same ground. We stated that

> while we do not necessarily endorse Judge Ritter's charge on wilful misconduct in the second trial in the Northern District of California in all respects, we perceive no basis in this or in other papers for concluding that the Judge would not charge the jury with respect to the Warsaw Convention in accordance with its language and applicable decisions of the Court. *Pekelis* v. *Transcontinental & Western Air*, 2 Cir. 187 F. 2d 122, 23 A. L. R. 2d 1349; *Grey* v. *American Airlines, Inc.*, 2 Cir., 227 F. 2d 282. Accordingly, we deny the application for prohibition or mandamus, thereby leaving it to Judge Ritter to determine whether or not, even though he is not in our judgment disqualified under 28 U. S. C. § 144, he desires to proceed as the trial judge. (*British Commonwealth Pac. Airlines, Ltd.* v. *Ritter*, unreported, 2d Cir. 1961.)

Judge Ritter proceeded.

resting on federal question jurisdiction. We have two federal court cases here, but in both jurisdiction rests on diversity of citizenship. Therefore, in light of the radiations of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1938), *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U. S. 487 (1941), and *Angel* v. *Bullington,* 330 U. S. 183 (1947), we might properly look initially to New York law to determine what law governs. Under it the question of collateral estoppel would seem to be governed by New York local law. See *Hinchey* v. *Sellers,* 7 N. Y. 2d 287, 295-96, 197 N. Y. S. 2d 129, 133-34, 165 N. E. 2d 156, 160-61 (1959). Compare *Peare* v. *Griggs,* 8 N. Y. 2d 44, 47, 201 N. Y. S. 2d 326, 327, 167 N. E. 2d 734, 735 (1960). But see Restatement (Second), Conflict of Laws § 430a (Tent. Draft No. 10, 1964). New York does not permit other persons injured in an accident to avail themselves of a prior plaintiff's judgment. *Elder* v. *New York & Pa. Motor Express, Inc.,* 284 N. Y. 350, 31 N. E. 2d 188, 133 A. L. R. 176 (1940). Should New York look to California law, the result would seem to be the same in a multi-plaintiff accident case like this. See *Nevarov* v. *Caldwell,* 161 Cal. App. 2d 762, 773-775, 327 P. 2d 111, 119 (1958) (hearing denied by California Sup. Ct.); cf. *Zdanok* v. *Glidden Co., supra,* 327 F. 2d at 955. But cf. *Bernhard* v. *Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942); *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co.,* 58 Cal. 2d 601, 25 Cal. Rptr. 559, 561, 375 P. 2d 439, 441 (1962).

There are further questions. The collateral estoppel effect to be given to a prior *federal* court judgment in a subsequent action in either a *federal or state* court might itself be a matter of federal law. The same holds for the collateral estoppel effect to be given to a prior judgment—*federal or state*—in a subsequent *federal* court action.

Here both the prior judgment and the subsequent actions are federal, although they are both, as noted, diversity actions. Thus, in *United States* v. *United Airlines, Inc.*, 216 F. Supp. 709, 718-25 (E. D. Wash. 1962), *aff'd on the opinion below sub nom. United Airlines* v. *Weiner*, 335 F. 2d 379, 404 (9th Cir.), *cert. dismissed*, 379 U. S. 951 (1964), the court determined as a matter of federal law that a prior federal court judgment in a diversity case was "final" for the purposes of *res judicata* or collateral estoppel, cf. *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F. 2d 80, 89-90 (2d Cir. 1961), *cert. denied sub nom. Dawson* v. *Lummus Co.*, 368 U. S. 986 (1962); moreover, it indicated that the same federal rule would apply even if the first judgment was in a state court. Even so, the application of either *res judicata* or collateral estoppel was in fact determined as a matter of state law;[6] jurisdiction in both cases was based, to the extent here relevant, on diversity of citizenship.

A choice among these various routes need not be made. For even if this case might be subject to a federal rule including the elimination of mutuality (see *Zdanok*), the defendants here should not be confronted with the *Zdanok* rule. Abandonment of mutuality was there thought sound unless (1) assertion of the plea of estoppel in successive actions would create anomalous results, or (2) the party had not had a full and fair opportunity to litigate the issue effectively. As *Halmos* and this case seem to be the only actions by the estates of passengers involved in this acci-

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[6]As a matter of state law, the court allowed plaintiffs to assert as an estoppel a judgment, then under appeal, for different plaintiffs against the same defendant in a federal district court action in California in which 24 actions involving passengers had been consolidated. As the second court noted, the first case "was litigated to the hilt" and the defendant had affirmatively indicated that it had no new, different or additional evidence. 216 F. Supp. at 728. The judgment in the first action as to liability was subsequently affirmed. 335 F. 2d at 388-92.

dent, there is no probability of anomalous results. However, while not necessarily suggesting that BCPA did not have a "full and fair opportunity to litigate" in *Halmos,* we think it would be unfair in this case to use the result of the second *Halmos* trial to the disadvantage of BCPA. At the conclusion of the second trial, *Zdanok* had not been decided. The result of the first trial was a victory for BCPA; of the second, a relatively small judgment. Had it sought still a third trial, it had to weigh victory against a much larger judgment. The failure to appeal for correction of whatever errors may have been made seems altogether reasonable and would very probably not have been the case if BCPA knew then that that judgment would govern the Kapell action in which far more—$7,003,000—was sought as damages.[7] In *Zdanok,* however, the first action was litigated as strenuously as would seem possible, see 327 F. 2d at 946 n. 1, and the issues—interpretation of a collective bargaining contract—were not likely to be decided on the basis of a jury's choice among different factual inferences, as was the case here.

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[7]Had *Zdanok* been decided then defendants would still have been in a dilemma. On a third trial, it could suffer a judgment anywhere between zero and $500,000. The $35,000 judgment in hand would be quite attractive. Whether that judgment would be used against it would then depend upon where a subsequent action was brought and, if that court followed a *Bernhard-Zdanok* approach, whether the first action were found to have provided defendants a "full and fair opportunity to litigate" the issues—not the most certain or objective standard to apply *in futuro.* Here the instant case had already been transferred from the state court to the Southern District by the time *Halmos* II was decided. Had it not been, BCPA might reasonably have expected New York law to govern, under which there could be no estoppel. Of course, even more uncertainty would exist if the applicable statutes of limitations had not run, nor been tolled, and the subsequent action had not even been begun at the time of the first judgment.

Even if the *Zdanok* approach were thought applicable to this prior judgment, mutuality should not so quickly be discarded in multiple accident cases like this. See 327 F. 2d at 955. The rejection of mutuality in *United States* v. *United Airlines, Inc., supra,* 216 F. Supp. at 725-29, may be distinguished on the ground that the first judgment involved 24 of 31 pending actions; the gravity of the potential liability is shown by the fact that the ultimate judgments against the airline totalled $2,337,308. 216 F. Supp. at 730. Obviously, the airline would have exerted its full efforts with so much at stake. See note 5 *supra.* Moreover, the first judgment was being appealed, so that possible errors were not being overlooked. Although the first judgment was affirmed, a reversal would presumably have redounded to the benefit of the defendant in the second action, compare *Maryland* for Use of *Levin* v. *United States,* 380 U. S.——,——n. 38, 85 S.Ct 1293 (1965); consolidation of the actions on appeal eliminated much of the possible conflict.

Thus, whether the applicability of collateral estoppel is governed by federal, New York or California law, the result in this case would be the same; BCPA was free to relitigate the question of "wilful misconduct."

III. *Conditional Grant of a New Trial on All Issues.*

Defendants attack as an abuse of discretion Judge Ritter's decision conditionally ordering a new trial on all issues if his granting of judgment n.o.v. were reversed on appeal. We agree. We observe initially that our review of this issue is hampered somewhat by the fact that Judge Ritter gave no reason for granting a new trial. Plaintiffs had asserted several possible grounds in making the motion, but our study of the record reveals that the grounds relied

upon must have been (1) that the verdict was against the weight of the evidence and (2) that defendants' counsel was guilty of prejudical misconduct in his argument to the jury. Cf. *Leighton* v. *One William St. Fund, Inc.*, 343 F. 2d 565, 567 (2d Cir. 1965).

A. *Verdict against the weight of the evidence.*

We have already held that there was sufficient evidence to go to the jury either under the governing Second Circuit standard or under Judge Ritter's lesser standard of wilful misconduct. To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, *Federal Practice* ¶ 59.08(5), at 3817, 3820 (2d ed. 1953), but we find that it was in this case. In light of the possible inferences as to what actually happened when the pilot began his let-down, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence. Cf. *Damanti* v. *A/S Inger*, 314 F. 2d 395, 398 (2d Cir.), *cert. denied sub nom. Daniels & Kennedy, Inc.* v. *A/S Inger*, 375 U. S. 834 (1963).

Nor can we accept plaintiffs' suggestion that the jury acted not on the evidence but out of prejudice and misunderstanding because it failed to award even the limited damages allowed under the Convention. It is true that defendants' counsel in his argument to the jury virtually conceded that their burden of proof on complete immunity had not been met. His statement, however, did not have sufficient formality or conclusiveness to be a judicial admission. See *Rhoades, Inc.* v. *United Airlines, Inc.*, 340 F. 2d 481, 484 (3d Cir. 1965); Note, *Judicial Admissions*, 64 Colum. L. Rev. 1121, 1132-33 (1964). Moreover, plaintiffs' counsel

thereafter urged quite ardently that the jury should award all or nothing. The jury having adopted the latter suggestion, plaintiffs cannot now complain because their quite understandable strategy backfired.

B. *Prejudicial statements.*

Nor can we find anything in what defendants' counsel said to the jury to warrant awarding a new trial. With few exceptions—none of which is substantial—apparently no objection was made at the time to remarks now challenged as being so prejudicial. Thus, "this challenge, raised for the first time on the motion for new trial, came too late." *Giffin* v. *Ensign,* 234 F. 2d 307, 316 (3d Cir. 1956); see *Vareltzis* v. *Luckenbach S.S. Co.,* 153 F. Supp. 291 (S. D. N. Y. 1957), *aff'd* 258 F 2d 78 (2d Cir. 1958).

In any case, the evidence here was almost entirely circumstantial. Any verdict would depend upon the inferences drawn from the known fragments, and most of what defendants' counsel did was to suggest certain inferences which could be drawn. In their memorandum to the trial court and on appeal, defendants have adequately shown that either they did not misstate the evidence or that any slight misstatements were not prejudicial. Misstatements of the law, if such there were, would not call for a new trial where the court's charge more than countered any such misstatements. Cf. *A. B. C. Needlecraft Co.* v. *Dun & Bradstreet, Inc.,* 143 F. Supp. 686 (S. D. N. Y. 1956), *rev'd on other grounds,* 245 F. 2d 775 (2d Cir. 1957). Nor can we agree with the trial judge that plaintiffs' claim of misconduct constituted grounds for a new trial. See "Appendix B," 219 F. Supp. at 327-28.

IV. *Defendants' Other Claims.*

Because we reverse for the above reasons, we do not reach defendants' arguments as to the admissibility of various items of evidence, nor Qantas' argument as to its possible responsibilities for the liabilities of BCPA.

V. *Plaintiffs' Appeal as to Pre-Judgment Interest.*

We reverse both the granting of judgment n.o.v. and the conditional granting of a new trial, thus reinstating the jury's verdict in favor of defendants and setting aside the judgment entered upon the second jury's determination of damages; the question of pre-judgment interest is moot. Cf. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851, 858 (2d Cir. 1965), *petition for cert. filed*, 33 U. S. L. Week 3376 (U. S. May 14, 1965) (No. 1168 1964 Term; No. 142, 1965 Term). Consequently, we dismiss plaintiffs' appeal from Judge McLean's order denying interest.

Judgment reversed with instructions to enter judgment upon the jury's verdict in favor of defendants. Plaintiffs' appeal from the order denying pre-judgment interest is dismissed.

APPENDIX B

U. S. Treaty

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR AND ADDITIONAL PROTOCOL

(WARSAW CONVENTION OF 1929)

49 U. S. Stat. 3000

ARTICLE 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability. 49 Stat. 3015.

U. S. Treaty
49 U. S. Stat. 3000

ARTICLE 17

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

* * *

ARTICLE 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. 49 Stat. 3019.

ARTICLE 22

(1) In the transporation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs.* Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000

*Accepted in this country as $8,300.00.

francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. 49 Stat. 3019.

* * *

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment. 49 Stat. 3020.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of June one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded with instructions to enter judgment upon the jury's verdict in favor of defendants-appellants in accordance with the opinion of this court with costs to defendants-appellants.

It is further ordered, adjudged and decreed that the appeal of the plaintiffs-appellants from the order denying pre-judgment interest be and it hereby is dismissed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,

HON. LEONARD P. MOORE,

HON. IRVING R. KAUFMAN,

Circuit Judges.

[SAME TITLE]

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
HON. ROBERT P. ANDERSON,
Circuit Judges.

T. Roland Berner and Arthur S. Lesser, Executors of the Estate of William Kapell, deceased,
Plaintiffs-Appellants,

v.

United Airlines, Inc., British Overseas Airways Corp.,
Defendants,

British Commonwealth Pacific Airlines, Ltd., British Commonwealth Pacific Airlines, Ltd., now d/b/a Qantas Empire Aviation, Ltd.,
Defendants-Appellants.

A petition for a rehearing in banc having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX F

Order Extending Time To File Petition For Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of the Estate of WILLIAM KAPELL, Deceased,
Petitioners,

VS.

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 17, 1965.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 11th day of October, 1965.

APPENDIX G

Defendants' Exhibit L

FLIGHT COUPON NO. 3